

48A C.J.S. Judges § 373

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Judges

Joseph Bassano, J.D.; Khara Singer-Mack, J.D.; Thomas Muskus, J.D.; Karl Oakes, J.D. and Jeffrey J. Shampo, J.D.

X. Special or Substitute Judges and Like Judicial Officers

C. Authority, Powers, and Duties of Special or Substitute Judge

§ 373. Record and presumptions of authority of special or substitute judge

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West's Key Number Digest

West's Key Number Digest, [Judges](#)  17, 18

The authority of a special or substitute judge ordinarily should appear from the record of the case in which he or she acts.

Generally, when a special judge is selected, the record must show the authority for the special judge's selection.¹ A trial court should strictly follow the rules for appointing special judges and judges pro tempore, and when a court appoints a special judge or a judge pro tempore, it should include an official appointment in the record and inform all the parties as to the appointment.² Accordingly, special judges should confirm that their authority to preside is contained in the record.³

In accordance with the general presumption of law that a person acting in a public capacity was properly appointed and was duly authorized to do so, the proper authority and the due appointment of a special or substitute judge will be presumed,⁴ and thus, the burden is on the party alleging the invalidity of the appointment of a special or substitute judge to prove the nonexistence of the authorizing conditions.⁵ Accordingly, favorable presumptions have been indulged in favor of the manner of selection,⁶ qualifications,⁷ and the existence of the grounds for selection,⁸ and it has been said that the election of a special judge is impervious to attack unless the facts that would defeat the election are recited in the record.⁹ Thus, while a special or substitute judge has no authority or jurisdiction, and his or her proceedings are void, where the record affirmatively shows that he or she has not been lawfully selected,¹⁰ as a general rule, the failure of the record to show the due authority of the special or substitute judge is not fatal,¹¹ and the lack of an appointment order has been treated as a mere irregularity in the record, correctable by a subsequent order nunc pro tunc.¹² There is authority, however, that a judge who has not been assigned to the case lacks authority to enter judgment in the absence of anything indicating that he or she is sitting by assignment or is signing the entry on behalf of the judge assigned to the case.¹³

Journalization of appointment or entry in court minutes.

Although a statute may provide that an order designating a judge must be filed in the court minutes, the fact that the designation of a judge is not filed in the court minutes until the day after trial does not vitiate the authority of the designated judge such that the entire proceeding would be rendered void.¹⁴ Likewise, although a journalized entry formally appointing an acting judge is the better practice, the failure to journalize an entry formally appointing an acting judge after recusal of the original judge does not render the actions of the acting judge void.¹⁵ It is not necessary that the appointment of a special judge be recorded in the court's minutes during the term of court at which the judge acted, and it is sufficient that the record be made complete on appeal.¹⁶

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Footnotes

- 1 Tex.—*In re Gonzalez*, 115 S.W.3d 36 (Tex. App. San Antonio 2003).
Order contained in supplemental record
Tex.—*Sparkman v. State*, 997 S.W.2d 660 (Tex. App. Texarkana 1999).
No authority when no indication in record that judge appointed
Ohio—*State v. Keith*, 2002-Ohio-7250, 2002 WL 31875968 (Ohio Ct. App. 8th Dist. Cuyahoga County 2002).
Certificate of assignment
Ohio—*State v. Archer*, 2003-Ohio-2233, 2003 WL 21000926 (Ohio Ct. App. 11th Dist. Portage County 2003).
Matter of authority rather than jurisdiction
Colo.—*People v. Sherrod*, 204 P.3d 466 (Colo. 2009).
- 2 Ind.—*Dearman v. State*, 632 N.E.2d 1156 (Ind. Ct. App. 1994).
Order of appointment invalid; judge without authority
Ga.—*State v. Kelley*, 302 Ga. App. 850, 691 S.E.2d 890 (2010).
- 3 Tenn.—*In re Valentine*, 79 S.W.3d 539 (Tenn. 2002).
- 4 Cal.—*In re Kent's Estate*, 6 Cal. 2d 154, 57 P.2d 901 (1936).
Mo.—*State v. Huett*, 340 Mo. 934, 104 S.W.2d 252 (1937).
Election of special judge presumed to be valid
Ark.—*Foundation Telecommunications, Inc. v. Moe Studio, Inc.*, 341 Ark. 231, 16 S.W.3d 531 (2000).
That assignment of retired judge was properly made is presumed
Tex.—*Alexander v. State*, 903 S.W.2d 881 (Tex. App. Fort Worth 1995).
- 5 Ind.—*Edwards v. Edwards*, 132 Ind. App. 567, 177 N.E.2d 919 (1961).
Okla.—*Taff v. State*, 1966 OK 266, 425 P.2d 970 (Okla. 1966).
- 6 Cal.—*In re Kent's Estate*, 6 Cal. 2d 154, 57 P.2d 901 (1936).
- 7 Ind.—*Edwards v. Edwards*, 132 Ind. App. 567, 177 N.E.2d 919 (1961).

- 8 Ark.—Titan Oil & Gas, Inc. v. Shipley, 257 Ark. 278, 517 S.W.2d 210 (1974).
- 9 Ark.—Foundation Telecommunications, Inc. v. Moe Studio, Inc., 341 Ark. 231, 16 S.W.3d 531 (2000).
- 10 W. Va.—State ex rel. Black v. Pennybacker, 144 W. Va. 612, 110 S.E.2d 265 (1959).
- 11 Idaho—Murphy v. McCarty, 69 Idaho 193, 204 P.2d 1014 (1949).
- Nev.—State v. Blackwell, 65 Nev. 405, 200 P.2d 698 (1948).
- 12 Colo.—People v. Sherrod, 204 P.3d 466 (Colo. 2009).
- 13 Ohio—Lungaro v. Lungaro, 2009-Ohio-6372, 2009 WL 4547634 (Ohio Ct. App. 9th Dist. Medina County 2009).
- 14 Ga.—Marsh v. Resolution Trust Corp., 211 Ga. App. 216, 439 S.E.2d 75 (1993).
- 15 Ohio—Williams v. Banner Buick, Inc., 60 Ohio App. 3d 128, 574 N.E.2d 579 (12th Dist. Butler County 1989).
- 16 Tex.—Moosani v. State, 866 S.W.2d 736 (Tex. App. Houston 14th Dist. 1993), petition for discretionary review granted, (Apr. 27, 1994) and judgment aff'd, 914 S.W.2d 569 (Tex. Crim. App. 1995).

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